APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1890. *December 2.*

MADHAVRA'V MANOHAR, (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* ATMA'RA'M KESHAV AND OTHERS, (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 2 TO 9), RESPONDENTS; AND BALVANT BA'JIRA'V AND OTHERS, (ORIGINAL DEFENDANTS, NOS. 3, 4, 6, 7 AND 9), APPELLANTS, *v.* A'TMA'RA'M KESHAV, (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1, 2, 8, 10 AND 11), RESPONDENTS.*

Suit for partition—Cash allowances payable from the Government Treasury—Saranjám—Impartibility—Custom of the family as to partibility—Vadil—Vadilki—Senior member of the family—Right of eldership—Amount set apart for the celebration of a festival—Separate celebration of the festival after division—Expenses of the separate celebration—Expenses of collecting the saranjám and pension incomes—Omission of the lower Court to pass a decree for partition among all the co-sharers—Decree for partition among the co-sharers passed in appeal.

Saranjáms are *primâ facie* impartible, the holders being required to make a suitable provision for their younger brothers. Where, however, it appeared that the members of a family had treated *saranjáms* as partible over a long period of years and had dealt with them as such in effecting partitions of the entire family estate, which consisted both of incomes and *saranjáms*,

Held, that the Court was justified in concluding that the *saranjáms* were either originally partible or had become so by family usage.

The plaintiff, an undivided member of a Hindu family, sued his co-sharers for division of *saranjám* and other family property. The defendant No. 1 contended that the *saranjám* was impartible. In any case he claimed to retain certain sums in his capacity as the eldest representative of the family for the performance of certain offices.

Held, further, that the right of *vadilki* (eldership) had not lost its original character of impartibility, and that it was impartible and transmissible to the eldest representative of the family.

Where in a suit for partition a certain sum was claimed by the eldest representative of the family for the purpose of celebrating a certain festival,

Held, that the branches of the family being completely separated, each branch would celebrate the festival apart and would necessarily require funds for its separate celebration, and that, therefore, the sum claimed by the eldest representative for the celebration of the festival could not be left undivided.

The Court of first instance having omitted to decree the shares of the defendants other than defendant No. 1, who demanded partition, their shares were declared and allowed in appeal.

Rámchandra v. *Venkatráv*(1) and *Bhujangráv* v. *Málojirav*(2) referred to.

* Appeals Nos. 109 and 111 of 1884.

(1) I. L. R., 6 Bom., 598. (2) 5 Bom. H. C. Rep., A. C. J., 161.

1890.

MÁDHAVRA'V MANOHAR v. ATMÁRÁM KESHAV.

THESE were appeals from the decision of Khán Bahádur M. N. Nánávati, First Class Subordinate Judge of Poona.

Suit for partition of *saranjám* and other property.

The plaintiff, Atmárám Keshav, sued to have his third share in the ancestral property in dispute, consisting of *saranjáms, inám* lands, cash allowances, lands, houses, &c., partitioned. Defendant No. 1 was the plaintiff's uncle. The plaintiff alleged that defendant No. 1 had succeeded his father, Manohar Bhivráv, (the plaintiff's grandfather), in the management of the property, and that he had refused to give the plaintiff his share.

Defendant No. 1, Mádhavráo Manohar, contended *(inter alia)* that the pension and *saranjám* property was legally and according to the custom of the country impartible, and that, therefore, the plaintiff was not entitled to any share thereof. In any case he claimed, as eldest representative of the family, to retain a sum of Rs. 1,200 as "*vadilki*" (right of eldership) and Rs. 600 on account of expenses of the Rámnavmi festival. He also claimed to be allowed certain other items set forth in his defence.

On the issues framed, the Court of first instance found *(inter alia)* that defendant No. 1 had not acquired any property, that out of the cash allowance he was not entitled to any amount on account of *vadilki* (right of eldership) and Rámnavmi festival, that the *saranjám* and pension allowance in dispute were divisible, and that the plaintiff was entitled to recover his share as claimed in the plaint.

With respect to the allowance on account of the Rámnavmi festival and *vadilki* (right of eldership), the Subordinate Judge observed:—

"The first defendant is admittedly the *vadil* (senior member of the family), but no evidence at all is adduced to show that even when the members of an undivided family want to separate and are separated, still it is the *vadil* alone that is entitled to perform the *utsah* (festival), and that, therefore, he is entitled to have a certain sum set apart to himself for the performance of it. *

* *. Then, as regards the amount claimed for *vadilki* (right of eldership), it would seem that the *vadil* (senior member

of the family) used to draw Rs. 1,200 for *vadilki*. * *. But the plaintiff says that it mattered little that the first defendant drew the amount, and that he himself did not get any share thereof, since he was an undivided member of the family, and was entitled to get his share thereof whenever he asked for it. The law of *vadilki* (right of eldership) does not obtain now in other cases of *saranjámdárs* or *jághírdárs*. The allowance was made, as argued by the plaintiff's pleader, for services to be rendered to the Sátára Maháráj, and there being no Sátára Maháráj now, no services are to be rendered to him, and the service ceasing, the property is divisible just like any other property. Paragraph 25 of Exhibit * speaks of its division The *hisháb yád* (memo. of account) of *Poush Shuddha* 3rd, *Sháke* 1761, (Exhibit 153) produced by the ninth defendant * and proved by him and referred to in paragraph 25 of Exhibit 93, the genuineness of which is beyond dispute, shows also the division of the sum. The amount comes out of property contended by the first defendant to be indivisible. If this property be satisfactorily and rightly held to be divisible, there can be no doubt about the divisibility of this amount of Rs. 1,200 * * It is only the *saranjám* and pension that are contended by the first defendant to be indivisible, the rest of the property in suit being admitted to be divisible * *. The fact of previous divisions being indisputable, the first defendant's pleader simply said that they were not binding on his client. But his own conduct cannot but be binding on him; and *Sri Gajapathi Rádhiká Patta Mahá Devi Garu* v. *Sri Gajapathi Nilamani Patta Mahá Devi Garu*[1] shows that an amicable partition is binding on descendants, and *Periasami* v. *Periasami*[2] shows the effect of a family arrangement regarding property once indivisible. Therefore, even if the *saranjám* and pension in this case be supposed to have once been indivisible, there can be no doubt of their divisibility now."

Against the decree passed by the Court of first instance defendant No. 1 preferred Appeal No. 109, and defendants Nos. 3, 4, 5, 6, 7 and 9 preferred Appeal No. 111 to the High Court.

(1) 13 Moore's I. A., 497. (2) L. R. 5 Ind. App., 61.

1890.

MÁDHAVRÁV MANOHAR v. A'TMÁRÁM KESHAV.

Branson (with *Mahádev Chimnáji Ápte* and *Rámchandra Ganesh Mundle*) for the appellant (defendant No. 1):—*Saranjáms* and allowances made in lieu of *saranjáms* are impartible, the holders being required to make suitable provisions for their younger brothers—*Rámchandra* v. *Venkatráv*[1]. If, however, the Court holds that they are not impartible, we contend that we are entitled to the *vadilki* allowance, which has all along been made to the eldest member of the senior branch of the family. That sum, namely, Rs. 1,200, should, therefore, be set apart for our use; so also the sum of Rs. 485, which we say is our self-acquisition, the plaintiff and others not having assisted us in the litigation of which it was the fruit. Provision should also be made on account of the expenses of the annual Rámnavmi festival and Darbár expenses which we have to incur now and then for paying visits to and entertaining illustrious persons. Expenses incidental to the collection of the *saranjám* from various Government treasuries should be deducted from the *saranjám* income. The plaintiff has been awarded a larger share by the lower Court than he was entitled to.

Mánekshán Jehángirshán Taliárkhán for the respondents (defendants Nos. 3, 4, 5, 6, 7 and 9):—*Saranjáms* are, no doubt, *primâ facie* impartible, but we contend that the *saranjám* in dispute is partible. It was divided between the members of the family on several occasions. There have been partitions ever since 1833. The sum of Rs. 485 cannot be the self-acquisition of defendant No. 1, as he acted in the suit as the manager of the family. No provision need be made for the expenses of the Rámnavmi festival, as it may be performed separately by the different branches, if they like. The lower Court has not awarded us our shares. They should be now awarded.

Shántárám Náráyan for the respondent (plaintiff):—The *saranjám* in dispute has been all along treated as partible. It should, therefore, be divided—*Bhujangráv* v. *Málojiráv*[2]. The *vadilki* allowance is also partible. The sum of Rs. 485 is not the self-acquisition of defendant No. 1; it should, therefore, be divided. No provision need be made for Rámnavmi and other expenses.

(1) I. L. R., 6 Bom., 598. (2) 5 Bom. H. C. Rep., A. C. J., 161.

Hari Sitárám Dikshit for the respondent (defendant No. 8):—The *saranjám* in dispute is partible, but not so the *vadilki*. But if the Court holds that the *vadilki* is partible, we should be given our share in it.

Branson in reply.

The judgment of the Court was delivered by

CANDY, J.:—This is a suit for the partition of ancestral family property consisting of lands and cash allowances payable out of the Government Treasury. The Subordinate Judge made a decree for partition of all the property mentioned in the plaint, with directions that certain sums should be paid by the plaintiff in respect of his share of the family debts. The first defendant, who is the "*vadil*" or representative of the eldest branch of the family, appeals on the ground that the Court ought to have held that so much of the property as was *saranjám* was legally and according to the custom of the country impartible, but in any case that the partition was not a proper one.

It is not in dispute that portion of the family property was held by *saranjám* tenure, consisting partly of certain "*amals*" received from the Government Treasuries in various districts, and partly of an annual cash allowance of Rs. 2,000 granted by the Bombay Government in lieu of certain *saranjám* "*amals*" derived from the revenues of villages, which, by arrangement between the British and Nizám's Governments in the early part of the century, were handed over to the latter. As to this latter allowance, a certificate was granted by the Collector under the Pensions' Act, XXIII of 1871, authorizing the Civil Court to take cognizance of the claim.

The nature of the *saranjám* tenure, although not necessary for the decision of the case, was considered and discussed by the Court in *Rámchandra* v. *Venkatráv*[1], and the conclusion arrived at that *saranjáms* are *primâ facie* impartible, the holders being required to make a suitable provision for their younger brothers. In that case it was admitted there had never been any partition between the parties, and in that important respect

(1) I. L. R., 6 Bom., 598.

1890.

MÁDHAVRÁV MANOHAR v. ÁTMÁRÁM KESHAV.

it differed from *Bhujangráv* v. *Málojiráv*(1), where the Court held that it was shown that "the lands of the family had always been treated as partible, although, when division was made, a larger share was assigned to the head of the family, to defray the expenses which would devolve upon him in that capacity."

In the present case the members of the Potnís family have throughout the present century treated the *saranjáms* as partible, and have dealt with them as such in effecting partitions of the entire family estate, which consisted both of *ináms* and *saranjáms*. This is shown by the division in 1833 between the three brothers Bhivráv (Bápu Sáheb), Yashvantráv (Dádá Sáheb) and Balvantráv (Bálá Sáheb), as recited in Exhibit 93, and not disputed by the defendant No. 1; and by the division in 1839-40 by Bhivráv, of the *ináms* and *saranjáms* which fell to his share, between his sons Manohar, Rámchandra and Vithal; and, lastly, by that in 1870 (Exhibit 93) between all the members of the several family, except defendant No. 1, Mádhavráv, who apparently did not approve of the partition as made by it; and is sufficient, we think, to justify the conclusion that the *saranjáms* were either originally partible or had become so by family usage.

Assuming, then, that the *saranjáms* are partible in common with the rest of the family property, we understood at the hearing that the partition made in 1870 by Manohar with the consent of all the members of the family, except defendant No. 1, Mádhavráv, would be accepted, subject to the consideration of certain items, the most important one of which was the 1,200 rupees appropriated as "*vadilki*" by the partition of 1833. It was contended by defendant No. 1 that the "*vadilki*" is not partible, and is transmissible to the eldest representative of the family. It is referred to in the partition of 1870 as having been assigned to the senior member of the family to provide for the expenses of attending and representing the family at Darbárs, and it appears that a portion of it, *viz.* Rs. 625, was temporarily allotted in 1840, (Exhibit 153), by Bhivráv to the second of his sons, Rámchandra, who resided at Sátára, in consideration of *darakh*, *i.e.*, of his performing the

(1) 5 Bom. H. C. Rep., A. C. J., 161 at p. 169.

duties of the family office of *potnís*; but on the determination of those duties that sum was resumed by Bhivráv's eldest son, Manohar, in 1852 (Exhibt 69) as part of the "*vadilki*," and that, too, although there were no longer any public services incidental to the office of *potnís*. This shows that the "*vadilki*" was regarded by Manohar himself as the hereditary right of the eldest member of the senior branch of the family, who is entitled by the custom of the family to represent it at Darbárs and public occasions, and that if he treated it otherwise in the partition of 1870, which defendant No. 1 refused to sign, it arose from his difference with his eldest son. We are, therefore, of opinion that defendant No. 1 is right in his contention that the 1,200 rupees per annum never lost its original character, and was impartible when first assigned as "*vadilki*," and that nothing happened in 1870 to change its character.

The next question relates to the sum of at least Rs. 600 which defendant No. 1 claims to deduct before partition on account of the expenses in connection with the Rammavmi festival. But it is evident that this deduction can only be allowed if the members of the family are in union and join in the common ceremony. Directly the families are completely separated, as will be the case here, each family will celebrate the festival apart, and necessarily require funds for its separate celebration.

The next question arises upon the third point mentioned in the Appeal No. 109. It appears that the branch of the family now represented by defendants Nos. 10 and 11 had disputes with Manohar (father of defendant No. 1). These were settled by an agreement in 1848 (Exhibit 111) by which the fathers of defendants Nos. 10 and 11 were to receive the Kolegaum *saranjám* (Ahmednagar District), and out of the same to pay Manohar annually Rs. 350; also they were to receive their share of the pension received from the Poona Treasury, the said share, after deductions, amounting to Rs. 419-8-0. Among these deductions was a sum of Rs. 150, which, with the item of Rs. 350 just mentioned, amounted to Rs. 500. This sum of Rs. 500 was to be taken by Manohar "for Sardárki and Rámnavmi expenses." On these facts alone it would be difficult to decide whether this

1890.

MÁDHAVRA'V MANOHAR v. ÁTMA'RA'M KESHAV.

sum of Rs. 500 was intended to be Manohar's self-acquired property or not. But it is clear from the document No. 94 passed in 1845 by Manohar to his uncle Yashvantráv, that Manohar intended that any advantage gained in the dispute with the branch of the family, now represented by defendants Nos. 10 and 11, should be shared by himself with his uncle Yashvantráv and Balvantráv. And as there is no separate mention of this item of Rs. 500 in the document No. 93 (executed in 1870), it is clear that Manohar treated it as in one way distinct from the rest of the ancestral property. Subsequently fresh disputes arose between this branch of the family, now represented by defendants Nos. 10 and 11, and Mádhavráv, who on Manohar's death was recognized by Government as the representative of the whole family. These disputes were settled by an agreement (Exhibit 112) dated 1879, by which Mádhavráv agreed to pay regularly to defendants Nos. 10 and 11 every year their share (*viz.*, Rs. 419-8-0) of the pension, but instead of paying them Rs. 1,056-9-0 which they had previously enjoyed from the Kolegaum *saranjám* it was agreed that he should deduct Rs. 485-1-0 "for Sardárki" and give them the balance Rs. 571-8-0. The present dispute is in regard to this sum of Rs. 485-1-0. In the absence of any other evidence to indicate whether this sum of Rs. 485-1-0 was intended to be personal to Mádhavráv, we must take it that it was intended by the parties to be treated in the same way as the previous item of Sardárki (Rs. 500) in 1848, *i. e.*, divisible like the rest of the ancestral property. Under this view of the matter we think that the Subordinate Judge was right in his order regarding this item.

At the hearing of the appeal, mention was made of the expenses necessarily incurred by defendant No. 1 in collecting the *saranjám* and pension from the various Government Treasuries. But no issue was raised as to this point in the lower Court, nor was any objection taken in the memorandum of appeal. It is, therefore, too late now to consider the point.

A further objection has also been taken that the Subordinate Judge did not decree the shares of the defendants other than defendant No. 1 who claimed partition. This should now be

done. In the property in which defendants Nos. 10 and 11 have their admitted share, the branches of Bhivráv and Yashvantráv and Balvantráv have each ⅓rd of the remainder. Plaintiff represents ⅓th of Bhivráv's ⅓rd; defendant 2 another ⅓th and defendant No. 1 another ⅓th; defendant No. 8 represents ⅓rd of Bhivráv's ⅓rd and defendant No. 9 the remaining ⅓rd of Bhivráv's ⅓rd: defendants Nos. 3 and 4 represent Yashvantráv's ⅓rd; defendants 5, 6, 7 represent Balvantráv's ⅓rd. In the property in which defendants 10 and 11 have no share the division will be the same, exclusive of any deduction on account of defendants 10 and 11. The Subordinate Judge ordered each party to bear his own costs. Under the circumstances, we think the same order will be fair in the present appeals.

Decree amended.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

SHRINIVAS HANMANT AND OTHERS, (ORIGINAL APPLICANTS), APPELLANTS, *v.* GURUNA'TH SHRINIVAS AND ANOTHER, (ORIGINAL OPPONENTS), RESPONDENTS.*

1890. *December* 17.

Civil Procedure Code (Act XIV of 1882*), Sec.* 265*—Partition effected by Collector in execution of a decree—Not subject to revision by Civil Court—Execution of decree.*

When the Collector makes a partition under section 265 of the Code of Civil Procedure (Act XIV of 1882), the Civil Court has no power to examine his work or to direct him to make a fresh partition.

Dev Gopál Sávant v. *Vásudev Vithal Sávant*(1) followed.

APPEALS from the orders of Ráv Bahádur Bábáji Lakshman, First Class Subordinate Judge of Dhárwár, in miscellaneous cases Nos. 80 and 81, 94 and 95 of 1888.

*Appeals Nos. 91 and 92 of 1889 and Nos. 3 and 4 of 1890.

(1) I. L. R., 12 Bom., 371.